



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Control Corp.

File: B-253410.3

Date: July 5, 1995

Charles D. Ablard, Esq., and Jeff H. Eckland, Esq., Faegre & Benson, for the protester.

Joseph J. Petrillo, Esq., and William E. Conner, Esq., Petrillo & Associates, for Control Data Systems, Inc., an interested party.

Theresa McKenna, Esq., Department of the Navy, and David R. Kohler, Esq., and Audrey H. Liebross, Esq., Small Business Administration, for the agencies.

Peter A. Iannicelli, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Unless the contracting agency agrees to a longer period, a contracting officer is required to wait only 15 days for the Small Business Administration to issue a certificate of competency before proceeding with award to another appropriately selected and responsible offeror.

DECISION

Control Corp. protests the Navy's decision not to award it a contract for computer maintenance services pursuant to request for proposals (RFP) No. N00123-92-R-0118. The protester contends that the Navy should terminate a contract (No. N00244-95-C-0042) awarded to Control Data Systems, Inc. (CDS) on April 1, 1993, pursuant to this solicitation and award Control a contract for the duration of the option period.¹

We deny the protest.

Issued on April 28, 1992, by the Naval Regional Contracting Center, the RFP requested offers for maintenance of two modified Control Data Corporation (CDC) CYBER 175 computers and peripheral equipment at the Naval Air Warfare Center (NAWC), Point Mugu, California. The RFP contemplated a

¹The Navy has already exercised the second option in its contract with CDS; this option expires on September 30, 1995.

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1-year, fixed-price contract and included options for 4 years. The RFP stated that a single contract would be awarded to the responsible offeror that submitted the lowest-priced, technically acceptable offer.

The RFP required each offer to include a preventive maintenance plan describing how the offeror proposed to meet the government's maintenance requirement. Offerors were required to supply evidence of having a complete set of CDC CYBER 875 computer systems maintenance diagnostics or, alternatively, could propose using their own vendor-developed systems maintenance diagnostics, provided they supplied evidence of the ability of their diagnostics to perform the work. The RFP specified that there would be no phase-in period and that the awardee must be ready to perform maintenance services on the effective date of the contract.

CDS owned and proposed to use a complete set of CDC CYBER 875 computer systems maintenance diagnostics. Control, a small business concern, did not own the CDC CYBER 875 maintenance diagnostics and, therefore, it proposed to use its own vendor-developed diagnostics. The Navy evaluated the proposals, conducted discussions and requested and received a revised proposal. Based on its evaluation, the Navy determined that CDS' revised proposal was technically acceptable while Control's proposal was unacceptable because its proposed diagnostics were inadequate.

On February 20, 1993, Control was given an opportunity to demonstrate the capabilities of its systems maintenance diagnostics on the Navy's CYBER 175 system. That demonstration was unsuccessful. Although Control was given a second opportunity to demonstrate its diagnostics, the demonstration was again unsuccessful and, by letter of April 28, 1993, the contracting officer notified Control that, because its diagnostics had not worked properly, its proposal did not meet the RFP's requirements, was technically unacceptable, and would not be considered for contract award. On May 5, the Navy awarded the contract to CDS.

On May 11, Control filed a protest (B-253410) with our Office contending that the Navy had essentially determined that Control was nonresponsible and, therefore, should have referred the matter to the Small Business Administration (SBA) for review under its certificate of competency (COC) procedures. We dismissed the protest as academic when Control advised us that the Navy had agreed to refer the

matter to the SBA for a COC determination.² Because the computers were critical to NAWC's mission, a stop work order was not issued and CDS continued to perform maintenance on the computer system pending the COC determination.

The SBA advised the contracting officer that its closing date for the case was August 4. However, when the basic contract period ended on September 30, the SBA had not yet issued its COC determination. Therefore, the contracting officer exercised the first contract option, extending the contract with CDS until September 30, 1994.

As part of the COC review, a third demonstration test was conducted affording Control yet another opportunity to demonstrate its diagnostics' capabilities. Representatives of the Navy, SBA, and Control were present at this test. Again, Control was unsuccessful in demonstrating that its systems maintenance diagnostics could correctly diagnose CYBER computer systems failures. Nonetheless, by letter of November 30, 1993, the SBA's Chicago Regional Office notified the contracting officer that it intended to issue a COC on behalf of Control. After the contracting officer asked the SBA to reconsider, and after further review, on June 2, 1994, almost 1 year after the matter was referred to it, the SBA issued a COC on behalf of Control.

By letter of July 5, the contracting officer notified CDS of the SBA's determination and that the Navy intended to terminate its contract with CDS for convenience and award the remainder of the contract to Control effective September 1. On July 14, CDS filed a protest (B-253410.2) in our Office contending that the Navy should not have referred the matter of Control's responsibility to the SBA for a COC determination because Control's proposal was, in fact, technically unacceptable because Control had failed to demonstrate that its diagnostics would work during the demonstration tests. We dismissed CDS' protest as untimely on August 18. The Navy then advised CDS that the Navy would not exercise the second option in its contract but instead would award the remainder of the contract to Control effective October 1.

On September 9, CDS filed suit in the United States Court of Federal Claims (Docket No. 94-592C) seeking declaratory and injunctive relief. Among other things, CDS requested the court to declare that the Navy should have rejected Control's proposal as technically unacceptable and should not have referred the matter to the SBA for a COC

²It is unclear from the record exactly when Control applied to the SBA for a COC, but the record shows that the matter was before the SBA by July 15.

The SBA agrees with Control that the Navy was required to award Control the contract upon the SBA's issuance of a COC. The SBA asserts that, under the Small Business Act, 15 U.S.C. § 637(b)(7)(A) (1988), it alone has conclusive authority to certify to government procurement officers with respect to all elements of responsibility of any small business concern to receive and perform a specific government contract. The SBA also asserts that its authority to issue a final disposition concerning the responsibility of a small business offeror is not limited to pre-award situations, but rather, its jurisdiction extends to post-award situations such as the present case.

It is clear from the record that the Navy believed Control's proposal was technically unacceptable based upon the failure of Control's systems maintenance diagnostics during the three separate demonstrations. On the other hand, the protester and the SBA argue that this was a matter of Control's responsibility for the SBA's conclusive determination. We need not decide whether the evaluation of the demonstration results was a matter of technical acceptability or responsibility. Even if we assume that this issue is in fact a matter of responsibility, since the SBA issued a COC in an untimely manner, the Navy was not required to terminate CDS' contract and award the remainder of the contract to Control.

Under the Federal Acquisition Regulation, § 19.602-4(c), unless the contracting agency agrees to a longer period, the contracting officer is required to wait only 15 days for the SBA to issue a COC before proceeding with the acquisition and awarding the contract to another appropriately selected and responsible offeror.³ See Eagle Sec., Inc., B-242397, Apr. 29, 1991, 91-1 CPD ¶ 415; T. Warehouse Corp., B-217111, June 27, 1985, 85-1 CPD ¶ 731. Here, it took much longer than the allotted 15 days--from July 15, 1993, to June 2, 1994--for the SBA to decide that Control was responsible and to issue a COC.⁴ Because almost 1 year had passed after the matter was referred to the SBA and more than 1 year had passed since the contract was awarded, there was no

³We recognize that the contract actually was awarded to CDS before the matter was referred to the SBA.

⁴CDS points out, and it is not refuted, that the Navy did not agree to allow the SBA longer than the required 15 days before the contracting officer would proceed with the acquisition. The granting of an extension beyond the 15-day period for processing a COC application is a matter within the contracting agency's discretion. See American Photographic Indus., Inc., B-206857, Sept. 29, 1982, 82-2 CPD ¶ 295.

requirement to terminate CDS' contract and award the remaining work to Control.

The protest is denied.

/s/ Michael R. Golden
for Robert P. Murphy
General Counsel